Cheong Bee Yong v MBf Finance Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S6–24–2576 OF 1999
AZMEL J
19 JANUARY 2001

Civil Procedure *— Declaration — Application for — Acquisition of condominium on offer advertised by the second defendant in a brochure — Declaration that plaintiff need not pay any loan interest to first defendant until the certificate of fitness of occupation is issued — Whether court should grant declaration sought by the plaintiff*

The second defendant, MBf Property Services Sdn Bhd, was managing certain property developers, which included Kabra Holdings Sdn Bhd. The latter was the developer of Ampang Hilir Condominium. The plaintiff purchased a unit of the condominuim from Kabra Holdings Sdn Bhd on the basis of an attractive offer advertised by the second defendant in a brochure. The brochure stated that no loan interests need to be paid until the issuance of the certificate of fitness. As no certificate of fitness of occupation ('CF') had been issued by the relevant authorities, the plaintiff sought a declaration that he need not pay back any loan interests to the first defendant until the CF has been issued.

Held, granting the application with costs borne by the first defendant:

In the circumstances it would be grossly unethical and certainly most unfair for the first defendant to ask the plaintiff to pay whatever interest accruing to the first defendant before the CF is issued, because such expenses would have to be borne by the developer, as had been unequivocally stated by their manager, the second defendant, in the brochure. The way the brochure was worded, it must be regarded as an undertaking to pay whatever expenses that arose before the issuance of the CF and the plaintiff had acted by purchasing a unit on the strength of such undertaking. Under no circumstances should the plaintiff be asked to pay. The first defendant was fully aware of the arrangement, as confirmed by the plaintiff in his affidavit (see p 399B–C).

[Bahasa Malaysia summary

Defendan kedua, MBf Property Services Bhd, telah mengurus pemaju-pemaju hartanah tertentu, termasuklah Kabra Holdings Sdn Bhd. Ia adalah pemaju Kondominium Ampang Hilir. Plaintif telah membeli sebuah unit kondominium daripada Kabra Holdings Sdn Bhd berdasarkan tawaran menarik yang diiklankan oleh defendan kedua di dalam risalah. Risalah tersebut menyatakan bahawa tiada faedah pinjaman perlu dibayar sehingga sijil penghunian dikeluarkan. Memandangkan tiada sijil penghunian ('SP tersebut') telah

dikeluarkan oleh pihak berkuasa yang berkaitan, plaintif memohon satu deklarasi bahawa beliau tidak perlu membayar balik apa-apa faedah pinjaman kepada defendan pertama sehingga SP tersebut telah dikeluarkan.

Diputuskan, membenarkan permohonan dengan ditanggung oleh defendan pertama:

Di dalam keadaan demikian adalah tidak beretika dan sememangnya tidak adil langsung bagi defendan pertama untuk bertanyakan kepada plaintif untuk membayar sama ada faedah yang terakru kepada defendan pertama sebelum SP tersebut telah dikeluarkan, kerana perbelanjaan tersebut akan ditanggung oleh pemaju, sebagaimana yang telah dinyatakan dengan taksa oleh pengurus mereka, di dalam risalah tersebut. Cara risalah tersebut dinyatakan, ia boleh dianggap sebagai satu aku janji untuk membayar apa-apa perbelanjaan yang timbul sebelum SP dikeluarkan dan palintif telah bertindak dengan membeli sebuah unit berdasarkan aku janji tersebut. Dalam apa keadaan sekalipun plaintif tidak patut diminta untuk membayar. Defendan pertama cukup sedar tentang pengurusan tersebut, sebagaimana yang disahkan oleh plaintif di dalah afidavit beliau (lihat ms 399B–C).]

Notes

For cases on declaration generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1497–1536.

Cases referred to

MBF Property Services & Anor v Balasubramaniam all K Arumugam [2000] 2 MLJ 269 (refd)

R Thayakugan (*Rajadevan & Assoc*) for the plaintiff.
KY Khoo (*Heng & Mogan*) for the first defendant.
ES Satharuban (*Satha & Co*) for the second defendant.

Azmel J: The second defendant, MBF Property Services Sdn Bhd was managing a number of property developers, one of which was Kabra Holdings Sdn Bhd, who was developing a housing project known as Ampang Hilir Kondominium, which was situated in the Mukim of Ampang, Ulu Langat District, Selangor. In promoting the sales of units of the housing project, the second defendant issued a brochure written with very attractive promises. Among others, the brochure stated:

> No interest — home purchase plan — we pay for it until your property is completed with certificate of fitness — SAVE RM21,735 INTEREST.

The brochure also stated:

> Under this plan you essentially only need to pay the 10% down payment (if you secure a 90% loan) and not a single sen UNTIL issuance of the certificate

of fitness (CF). Any loan interests incurred in the meantime shall be borne by the developers. A

On the basis of this attractive offer the plaintiff purchased a unit of Ampang Hilir Kondominium from Kabra Holdings Sdn Bhd at the price of RM184,700 vide a sale and purchase agreement dated 18 September 1993 on which date the plaintiff had paid 10% of the purchase price. On 20 September 1993 the plaintiff was offered by the first defendant, MBF Finance Bhd, a housing loan amounting to RM166,200 for payment of the balance of the purchase price of the said unit. Clause 8 of the letter of offer states: B

Repayment C

Interest on the loan shall be payable monthly until full disbursement thereof. Upon full disbursement of the loan, repayment will be by 360 equal monthly installments of principal and interest of RM1,561; the first installment to be made on the first day of the month following next after the date of full disbursement.

The monthly installment amount will be varied according to the change of interest rate as defined in cl (6) herein. D

Subsequently by a letter dated 22 September 1993 the first defendant caused an amendment to cl 8 of the letter of offer as follows:

Clause 8 — Repayment

Interest on the loan shall be payable monthly until the issuance of the certificate of fitness for occupation (CFO). Upon issuance of certificate of fitness for occupation (CFO), repayment will be by 360 equal monthly installments of principal and interest of RM1,561.88, the first installment to be made on the first day of the month following next after the date of issuance of certificate of fitness for occupation (CFO). However, we reserve the right to effect the commencement of the monthly installment of principal and interest at our absolute discretion from time to time. E F

The monthly installment amount will be varied according to the change of interest rates as defined in cl (6) herein.

By a letter dated 3 September 1998, the second defendant indicated that they were ready to hand over vacant possession of the said premises to the plaintiff. However, till today, the certificate of fitness of occupation ('CF') of the said premises has not been issued by the relevant authorities. In the light of the above, the plaintiff now sought from this court a declaration as follows: G

(a) Suatu deklarasi bahawa plaintif tidak perlu membayar balik pinjaman perumahan, pokok dan faedah kepada defendan pertama di bawah perjanjian pinjaman bertarikh 30 Oktober 1993 sehingga pengeluaran sijil perakuan menduduki untuk premis yang dikenali sebagai C–02–3A Kondominium Sri Angsana Hilir. H

From the facts and circumstances as stated above, there appear to be a package between the developer and the financier to promote the sale of the units constructed by the group of developers, of which Karba Holdings Sdn Bhd was one of them. The developer through their manager, MBF Finance I

Services Sdn Bhd (second defendant) had given the undertaking that the purchaser of the units would not have to pay even a cent until the CF is issued. And whatever expenses incurred before the issuance of the CF would be borne by the developer concerned. And it was because of this attractive offer that the plaintiff agreed to purchase the said unit as he would be able to save a minimum of RM21,735. In the circumstances, it would be grossly unethical and certainly most unfair for the first defendant to ask the plaintiff to pay whatever interest is accruing to the first defendant before the CF is issued, because such expenses would have to be borne by the developer as had been unequivocally stated by their manager, the second defendant, in the brochure. The way the brochure was worded it must be regarded as an undertaking to pay whatever expenses that arose before the issuance of the CF and the plaintiff had acted by purchasing a unit on the strength of such undertaking. Under no circumstances should the plaintiff be asked to pay. The first defendant was fully aware of the arrangement, as confirmed by the plaintiff in his affidavit. The case of *MBF Property Services & Anor v Balasubramaniam a/l K Arumugam* [2000] 2 MLJ 267 is directly in point. Clause 8 as regards repayment in respect of the loan agreement was similarly worded. In *Arumugam's* case Gopal Sri Ram JCA said at p 269:

> The three documents; the sale and purchase agreement the agreement with the first appellant and the loan agreement with the second appellant, must be read together as they form part of the same transaction ...
>
> When the three documents are read as a whole, their effect is this. In the first place, the respondent shall purchase the property from the developer at a specified price and terms provided under the sale and purchase agreement. Thereafter, the first appellant shall keep the respondent indemnified and harmless in respect of any monetary payments due to the second appellant until the certificate of fitness of occupation is issued. Secondly, the second appellant will lend money to the respondent to pay for the purchase upon the mutual convenants contained in its letter of offer subject to the condition that the interest will be paid by the first appellant during the relevant period.

The Court of Appeal in the *Arumugam's* case decided in favour of the purchaser respondent.

In the light of the similarities on the facts between this case and the *Arumugam's* case as mentioned above, I have no choice but to be bound by the decision of the Court of Appeal.

In the circumstances, I granted the declaration as sought for by the plaintiff. I also ordered that the costs of this action be borne by the first defendant.

Application granted with costs borne by the first defendant.

Reported by Wong Ee Lynn